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Issue Date: 26 April 2005

In the Matter of:

RICHARD SAYLOR,
Claimant,

v. **Case No.: 2003-BLA-06311**

GATLIFF COAL COMPANY/
OLD REPUBLIC INSURANCE COMPANY,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

John Hunt Morgan, Esq., Edmond Collett, PSC, Hyden, KY
For Claimant

John Baird, Esq., Baird & Baird, Pikeville KY
For Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Richard Saylor ("Claimant") on August 3, 2001. The instant claim is the second claim filed by Claimant, the first having been denied by Administrative Law Judge Richard E. Huddleston on January 13, 1997, with the denial affirmed by the Benefits Review Board on January 22, 1998. The responsible operator is Gatliff Coal Company ("Employer") and the Carrier is Old Republic Insurance Company ("Carrier").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National*

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

Mining Assn. v. Dept. of Labor, 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003, solely for the purposes of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant first filed a claim for black lung benefits on December 1, 1993. (DX 1).[3] Following a hearing held on March 19, 1996, at which the Claimant testified, Administrative Law Judge Richard E. Huddleston issued a "Decision and Order – Denying Benefits" dated January 13, 1997. *Id.* Judge Huddleston found that the Claimant had failed to establish that he suffered from pneumoconiosis or (assuming, arguendo, that he had pneumoconiosis) that he was totally disabled. *Id.* On appeal, the Benefits Review Board affirmed the denial of benefits based upon Claimant's failure to establish pneumoconiosis, in a Decision and Order of January 22, 1998, and did not reach the issue of total disability. *Id.*

The claim that is now before me was filed on August 3, 2001. (DX 3). On July 26, 2002, the District Director issued a Schedule for the Submission of Additional Evidence, which stated that Claimant would not be entitled to benefits if a decision were issued at that time and that the named coal mine operator ("Gatliff Coal Co C/O James Sedgewick Of TN") was the responsible operator. (DX 21). A Proposed Decision and Order, issued by the District Director on May 6, 2003, denied benefits to the Claimant. (DX 29). The district director found that Claimant worked as a coal miner for 8 years, from 1959 until October 1, 1993 and that he contracted pneumoconiosis as a result of the conditions of his coal mine employment; however, the district director also found (somewhat inconsistently) that the evidence did not show that the disease was caused at least in part by coal mine employment and that the disease did not cause a breathing impairment sufficient to establish total disability. *Id.* The responsible operator was identified as "Gatliff Coal Co." *Id.* Claimant requested a formal hearing and the case was transferred to the Office of Administrative Law Judges for a hearing on July 15, 2003 (DX 30, 35).

The Director, through counsel, moved for summary decision on the responsible operator issue on March 24, 2004. No opposition was filed. By Order of April 8, 2004, I granted the Director's motion for summary decision and found that Gatliff Coal Company would be the responsible operator liable for the payment of benefits, if awarded.

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[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's Exhibits 1 through 35, Claimant's Exhibit 1, and Employer's Exhibits 1 through 11, admitted into evidence at the April 28, 2004 hearing, will be referenced as "DX, "CX", and "EX", respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

A hearing in the above-captioned matter was held on April 28, 2004 in London, Kentucky. The Claimant was the only witness to testify. At the hearing, Director's Exhibit 1 through 35 ("DX 1" through "DX 35"), Claimant's Exhibit 1 ("CX 1"), and Employer's Exhibit 1 through 11 ("EX 1" through "EX 11") were admitted into evidence (with EX 11 to be the transcript of the deposition of Dr. David Rosenberg that had been taken on April 23, 2004 but not yet transcribed). A Designation of Evidence/BLBA Evidence Summary Form was submitted on behalf of the Claimant, the Employer, and the Director. At the conclusion of the proceedings, the record was kept open for a period of 30 days for the submission of the transcript of Dr. Rosenberg's deposition, with briefs or written closing arguments to be submitted within 30 days of completion of the record. Employer submitted Dr. Rosenberg's deposition transcript under cover letter of May 10, 2004, filed on May 14, 2004, and Employer submitted a brief under cover letter of June 16, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are timeliness, existence of pneumoconiosis, its casual relationship with coal mine employment, total disability, and causation of total disability, in addition to a number of issues listed solely for appellate purposes. (Tr. 7). Although there was a previous claim, the threshold issue of subsequent claims (under 20 C.F.R. §725.309) was not listed on the CM-1025 transmittal form nor has it been raised by any of the parties. (DX 35). However (as discussed below), inasmuch as a reopening of the claim would require the Claimant to establish one of the elements of entitlement upon which the denial was premised, and each element would have to be established for the Claimant to prevail, there is no practical significance of the failure to list "Subsequent Claims" as an issue on the transmittal form. *See* 20 C.F.R. §725.309. At the hearing, Employer withdrew the issue of responsible operator and the associated issue of last coal mine employment of not less than one year. (Tr. 6).

Length of coal mine employment was not listed as an issue on the CM-1025 transmittal form, but the district director referenced a finding of "8 years." Employer stipulated to the eight years of coal mine employment found by the district director. (Tr. 7). However, Claimant's counsel pointed out that Judge Huddleston found that the Claimant had established at least ten years of coal mine employment and argued that his finding was binding under res judicata (or, more precisely, collateral estoppel). (Tr. 8). As I indicated, that finding could be considered the law of the case, particularly in view of the fact that it was by stipulation. *Id.* That stipulation was made on the record at the March 19, 1996 hearing before Judge Huddleston (see transcript at page 16) (DX 1), and Judge Huddleston adopted it in his January 13, 1997 decision (DX 1). Under subsection (d)(4) of section 725.309 (relating to subsequent claims), "any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim." Thus, while I agree that length of coal mine employment is not at issue, that is because the previous stipulation of the parties of at least ten years of coal mine employment is binding.

The parties stipulated to one dependent (the Claimant's wife, Iva) for augmentation purposes. (Tr. 10).

Medical Evidence

The medical evidence submitted in connection with the instant claim, as designated by the parties, consists of the following;

Interpretations of chest X-rays taken on March 26, 2002 and August 27, 2002 were submitted, as summarized below.

Exhibit No./ Party designating	**Date of X-ray/ Reading**	**Physician/ Qualifications**	**Interpretation**
DX 11 DOL Exam. & Claimant Initial	03/26/2002[4] same	Glen Baker A-reader[5]	Pneumoconiosis 1/0, p/p 3 zones (middle and upper right) fr [fractured rib(s)] Quality 1
DX 11 DOL Exam [Quality reading]	03/26/2002 05/03/2002	E.N. Sargent BCR, B-reader	Quality 1 fr [fractured rib(s)]
DX 12 Employer Rebuttal	03/26/2002 08/26/2003	J. Wiot BCR, B-reader	Negative for pneumoconiosis; old left clavicle fracture and right rib fracture Quality 2 (high contrast)
DX 13, EX 4 Employer Initial	08/27/2002 same	A. Poulos BCR, B-reader[6]	Negative for pneumoconiosis fr [fractured rib(s)] Quality 1
EX 6, 11 Employer Initial	08/27/2002 same (?)	D. Rosenberg B-reader	Negative for parenchymal abnormalities consistent with pneumoconiosis; Pleural abnormalities (plaque) consistent with pneumoconiosis. Quality 1

Pulmonary function tests were taken on January 9, 2002 (DX 12; DOL Examination) and on August 27, 2002 (EX 2, 11; Employer's Initial Evidence). The results were:

[4] Although Dr. Baker referenced a "1/09/02" x-ray in his examination report of that date, the reading he submitted relates to an x-ray dated March 26, 2002. (DX 12).

[5] It appears that Dr. Baker was a B-reader through January 31, 2001, as indicated on his curriculum vitae (CX 1), but he indicated that he was not a B-reader on the x-ray form relating to the March 26 2002 x-ray (DX 11). According to the B-reader list appearing at the Office of Administrative Law Judges website (www.oalj.dol.gov), Dr. Baker, who had previously been a B-reader, was an A-reader from February 1, 2001 to May 31, 2002, and he again achieved B-reader status on June 1, 2002.

[6] The district director excluded this reading from consideration under 20 C.F.R. §718.102(d) because the x-ray was not submitted. (DX 27). However, the district director has not made a sufficient record to provide a basis for me to exclude the reading.

Exhibit No.	Date/ Physician	Age/Height	FEV1	FVC	MVV	Qualifying?
DX 11	01/09/2002 G. Baker	69 65 ½ inches	2.43 (pre)	3.64 (pre)	Not done	No
EX 2, 11	08/27/2002 D. Rosenberg	70 67 inches	2.44 (pre)	3.24 (pre)	85 (pre)	No

The results of the January 9, 2002 PFTs were validated by Dr. Matt Vuskovich in a report of March 29, 2004, which also discussed the ABGs taken at the same time. (EX 9). Neither of the tests produced qualifying results under 20 C.F.R. §718.204(b)(2)(i) and Part 718, Appendix B.

Arterial blood gases (ABGs) were taken on January 9, 2002 (DX 12; DOL examination) and on August 27, 2002 (EX 2, 11; Employer's Initial Evidence). They produced the following values, none of which were qualifying under Part 718, Appendix C:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 11	01/09/2002	G. Baker	39 (rest) 33 (exercise)	80 (rest) 111 (exercise)	No
EX 2	12/17/2002	D. Rosenberg	36.7 (rest)	92.6 (rest)	No

Medical opinions were rendered by the following physicians: (1) Dr. Glen Baker, based upon his January 9, 2002 examination (DX 11; DOL examination); (2) Dr. David Rosenberg, based upon his September 27, 2002 examination (EX 2, 11; Employer's Initial Evidence); and (3) Dr. Gregory Fino, based upon his March 25, 2004 review of the evidence (EX 7; Employer's Initial Evidence).[7] Dr. Baker found that the Claimant had coal worker's pneumoconiosis but Drs. Rosenberg and Fino found that he did not. None of these physicians found the Claimant to be totally disabled from a pulmonary or respiratory impairment.

In addition to the above, evidence was submitted in connection with the Claimant's prior claim. (DX 1). It is summarized in Judge Huddleston's January 13, 1997 decision. *Id.*

Background and Employment History

Claimant was the only witness to testify at the hearing. He had previously testified before Judge Huddleston on March 19, 1996 in Corbin, Kentucky. (DX 1). Also in connection with the previous claim, he had his deposition taken on June 23, 1995. *Id.* For the instant claim, he also had his deposition taken, on April 15, 2002. (DX 6).

At the hearing before me, Claimant testified that he was born in June 1932 and would be 72 years old on his next birthday. (Tr. 9). He was still married to his wife, Iva, and she was dependent upon him. (Tr. 9-10). In addition, one of his grandchildren lives with him most of the time but Claimant has not adopted him. (Tr. 10).

[7] Dr. Baker had examined the Claimant for the Department of Labor at the time of his previous claim and Dr. Fino also issued a review report at that time. (DX 1).

Claimant testified that his last employer was MSHA [the Mine Safety and Health Administration] and that he worked for them as a Federal Inspector from 1977 until October of 1993, when he took an early retirement. (Tr. 11). In that capacity, he inspected surface coal mines and tipples. *Id.* The job required driving out to a strip pit but there was "no manual labor that hard" because he was just required to inspect a piece of equipment; the only hard part involved climbing up the ladder to go in a loader or climb up on a dozer. (Tr. 20). There was a lot of paperwork and he wrote a lot of citations. *Id.* At that job, he was exposed to some dust when he would put the machines on to test them. (Tr. 14).

Before working as a mine inspector, Claimant worked in the mines, beginning in 1959. (Tr. 12, 18-19; see also DX 4). Approximately one third of his work was underground and the remainder was on the surface. (Tr. 13, 21). When he worked for Gatliff, he worked around a continuous miner, and he also worked at the tipple, where coal was crushed, and at the surface mines. (Tr. 12). He also worked for Wrenwood, which was not connected with Gatliff, although Gatliff bought the Wrenwood Tipple. *Id.* At the tipple, he worked "around where the crusher was to load coal out." *Id.* He also operated a dozer in the strip pit.[8] (Tr. 12-13). The dozer did not have a cab on it so his face would be caked with dust every day and he would breathe some of it. (Tr. 14). When he was underground, he operated the bridge for the miner, where the coal would come off and go on the belt. (Tr. 13). The machine he operated was a mobile bridge carrier, and it would follow the miner. *Id.* He was exposed to coal dust the entire time that he worked for Wrenwood and Gatliff, and he had more dust exposure working with Wrenwood and Gatliff than he did when he was inspecting the mines. (Tr. 14).

Claimant described his breathing problems as "giv[ing] out in a day's time, maybe by oxygen" and stated that the reason he retired was that he would "give out." (Tr. 15). He explained that he could not return to his jobs in the mines – working at the tipple, the pit, or the underground coal mine – because he was not even able to work as a mine inspector, which was a much easier job. *Id.* Claimant stated that he was totally disabled for any type of employment. (Tr. 15-16). At the present time, he experiences shortness of breath, or smothering, after "an hour or two hours at hard work." (Tr. 16). He also has episodes of coughing whenever he does anything that affects his breathing and he coughs up sputum every morning. (Tr. 16). At the present time, he is not being treated by a doctor because he "can't afford the doctor to treat" him. (Tr. 16-17).

Claimant applied for the job with MSHA based upon his years of coal mine employment; they required something like five or seven years of experience. (Tr. 17-18). After he was hired, he went to Beckley, West Virginia for training and he received a certification; there was also annual training required. (Tr. 18). At the time he was hired, he believes he had ten or more years of coal mine employment. (Tr. 18-19). Some of his employment from the earlier days did not show up on the computer. (Tr. 19).

When Claimant left the mines in 1977, he was given a physical by Dr. Bushey. (Tr. 19). Dr. Bushey told him that he did not need to work any more and could probably work only a

[8] At the previous hearing (transcript at pages 26 to 28), he explained that his last job in the mines was operating a dozer for Renfro Coal Company, a job which did not require lifting or much walking. At Gatliff, he operated a dozer and also operated a tipple, which did not require much lifting. *Id.*

couple of years more in the coal industry, due to Black Lung. (Tr. 19). Claimant rejected the offer of disability because he wanted to keep on working. *Id.*

Claimant testified that he has not worked anywhere since he retired in October of 1993. (Tr. 22). He received his government retirement benefits when he retired and started to draw retirement Social Security benefits two years later. (Tr. 12, 21). He did not file a State black lung claim and he is not receiving disability benefits. (Tr. 21-22).

Discussion and Analysis

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1).

For refiled or subsequent claims, there is an exception allowing the admission of evidence from prior federal black lung claims, appearing at 20 C.F.R. § 725.309(d)(1) (2001).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence

because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; s*ee* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5.

In this case, the parties have complied with the evidentiary limitations. As noted above, evidence from the previous claim may be considered by virtue of 20 C.F.R. §725.309(d)(1).

Subsequent Claims Analysis

The instant case is a subsequent claim. Previously, such a claim would be denied based upon the prior denial unless the claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). In the Sixth Circuit, the standard for establishing a material change in conditions was set forth in S*harondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), which required, inter alia, that the newly submitted evidence establish an element previously adjudicated against the claimant. In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit stressed that a claimant's new claim must be stronger with respect to an individual element for a claimant to establish a material change in conditions under *Sharondale.*

The amended regulations have replaced the material-change-in-conditions standard with the following, essentially similar standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[9] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

[9] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003).

The prior claim was denied by Judge Huddleston because the Claimant failed to establish that he had pneumoconiosis or that he had a totally disabling respiratory or pulmonary impairment, but the Benefits Review Board affirmed the finding of pneumoconiosis and did not address the second issue. (DX 1). There is some question as to whether this claim needs to be evaluated as a subsequent claim as that issue was not referred for consideration and no party has objected to it being omitted. Moreover, Employer did not list "subsequent claims" as an issue that it contested.

Extended discussion on this issue is unnecessary, as the preponderance of the evidence clearly shows that, even if this claim is reopened and considered on the merits, Claimant cannot prevail. In particular, the evidence does not show that the Claimant is disabled from a pulmonary or respiratory condition to such an extent that he would be unable to perform his last coal mine job as a dozer operator. *See* 20 C.F.R. §718.204(b)(1). I will therefore proceed directly to this issue.

Merits of the Claim: Total Disability.

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of

time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. [10] 20 C.F.R. §718.204(b)(2).

With respect to the evidence that was previously of record, I agree with Judge Huddleston's determination that it does not establish total disability. (DX 1). The evidence submitted in connection with the instant claim does not establish total disability either.

Pulmonary function tests. Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. Pulmonary function tests taken on January 9, 2002 (DX 12) and on August 27, 2002 (EX 2, 11) did not produce qualifying values, based upon the FEV1 values. Claimant has failed to satisfy section 718.204(b)(2)(i).

Arterial Blood Gases. Arterial blood gases were taken on January 9, 2002 (DX 12) and on August 27, 2002 (EX 2, 11). All of the ABGs were taken at an altitude of between 0 and 2999 feet. None of the tests produced values that were qualifying under Part 718, Appendix C. Claimant has failed to satisfy section 718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical Opinions. Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of section 718.204, or where pulmonary function tests and/or blood gas studies are medially contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory findings, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment or comparable work. §718.204(b)(2)(iv). The following medical opinions addressed the issue of total disability:

(1) Dr. Glen Baker, a board-certified pulmonologist,[11] examined the Claimant for the Department of Labor on January 9, 2002. (DX 11, CX 1). His examination report included a work and personal history, detailed physical findings, and test results. On the examination form, Dr. Baker indicated that the Claimant's impairment was "minimal" and in a supplemental form he checked the box for "No Impairment" when asked to categorize the extent of the miner's

[10] For a living miner's claim, total disability may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

[11] As used herein, a "board-certified pulmonologist" is a physician board certified in internal medicine with the subspecialty of pulmonary diseases.

pulmonary disability. *Id.* Dr. Baker had previously examined the Claimant in connection with the prior claim. (DX 1).

(2) Dr. David Rosenberg, a board-certified pulmonologist, examined the Claimant for the Employer on September 27, 2002. (EX 2, 3). In his examination report, he discussed the Claimant's past medical, family, social, and work history and physical examination findings. He noted that the Claimant did not have significant obstruction or restriction and his diffusing capacity and oxygenation status were normal. Dr. Rosenberg concluded that the Claimant "could perform his previous coal mining job or other similar arduous types of labor." *Id.* He reiterated that conclusion at his deposition. (EX 11 at page 24).

(3) Dr. Gregory Fino, a board certified pulmonologist, reviewed all of the evidence and prepared a report dated March 25, 2004 (EX 7, 8). Dr. Fino determined that there was no respiratory impairment present; that from a respiratory standpoint, the Claimant was neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort; and that even if he were to assume that the Claimant had coal worker's pneumoconiosis, it has not caused any impairment or disability. *Id.* Dr. Fino had also offered an opinion in connection with the previous claim. (DX 1).

(4) Dr. Matt Vuskovich. who is board certified in occupational medicine, prepared a report dated March 29, 2004 that was confined to a discussion of the pulmonary function and ABG studies conducted on January 9, 2002. (EX 9). As such, it does not constitute a reasoned medical opinion. In addition, it would fall outside of the evidentiary limitations if it is deemed such, as it was offered solely as rebuttal to the test results. It will not, therefore, be considered as medical opinion evidence. In any event, it does not assist the Claimant.

In view of the above, the medical opinions evidence does not support a finding of total disability under section 718.204(b)(2)(iv).

There is thus no evidence supporting a finding of total disability under section 718.204 apart from the Claimant's own testimony, which is insufficient to establish total disability under section 718.204(d)(5). Moreover, considering the medical evidence along with the Claimant's testimony and description of his work, which was not particularly arduous, I find that he has not established that he is incapable of performing his last and usual coal mine employment as a dozer operator. This claim must therefore be disallowed.

CONCLUSION

Claimant cannot establish a necessary element of a claim for benefits under the Black Lung Benefits Act. Accordingly, this claim must be denied and it is unnecessary to address the remaining issues.

ORDER

IT IS HEREBY ORDERED that the claim of Richard Saylor for black lung benefits be, and hereby is, **DENIED.**

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.